IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No.200 of 2005
in
Notice of Motion No. 82 of 2004
in
Notice No.N/24 of 2004

1. Ramavtar Kunjilal Gupta
and anr. ..Appellants

vs.

1. SICOM Limited & Anr. ..Respondents

Mr.Shailesh Shah i/b Mr.Mansukhlal Hiralal for appellants.

Mr.Kishor Jain i/b Mr.P.V.Shah for respondent no.1.

CORAM: A.P.SHAH &
S.J.VAZIFDAR JJ.
29th March, 2005

P.C.

1. This appeal is directed against the order of the learned single Judge of this Court dismissing the notice of motion under section 9(5) of the Presidency Towns Insolvency Act, 1909 to set aside the insolvency notice. Only few facts need to be stated in order to appreciate the controversy between the parties. The respondents are judgment creditors. The respondents served a notice on the judgment debtors i.e. the appellants based upon the decree in their favour in the sum of Rs.4,43,18,813/- with interest thereon at the rate of 18% p.a. as set out in the notice. Pursuant to

the notice being served, appellants took out a notice of motion for setting aside the insolvency notice served on respondents. In support of the motion, an affidavit of appellant no.2 was filed on behalf of himself and appellant no.1. By the said affidavit number of objections were raised which were repelled by the learned single Judge and the motion was dismissed.

2. Mr.Shailesh Shah, learned Counsel appearing for the appellants contended that the notice is based on a decree passed by this Court on 30th June 1989 in Summons for Judgment No.108 of 1989 in Summary Suit No.3646 of 1987, more than 12 years have passed after the date of the said decree and as such the decree is barred by law of limitation and inexecutable and consequently the notice is bad in law. This objection was negatived by the learned single Judge on the ground that the judgment creditors had taken out a Notice under Order XXI Rule 22 of the Code of Civil Procedure pursuant to the Execution Application no.386 of 2003 lodged by the judgment creditors on or before 3rd September, 2003. That notice was made absolute by order dated l2nd December, 2003. Therefore, objection raised was hit by resjudicata and/or principles of constructive resjudicata. Mr.Shah, however,

relying upon the decision of this Court in Laxman Dayaram Wani Vs. Shivram Gatlu Patil; ILR 1977 460 contended that before applying the principles of constructive resjudicata the Court must proceed with caution and unless there is something to show that the Court has decided the issue then only by principles of constructive resjudicata becomes final and debars the party from raising the contention in the subsequent proceedings. The Court must see whether there is sufficient material on record to show that such a decision had taken place.

3. We find absolutely no merit in the submission of Mr.Shah. In Mohanlal Vs. Benoy Kishna; A.I.R.1953 S.C.65 where the Supreme Court held that the doctrine of constructive resjudicata is applicable even in respect of an objection as to the jurisdiction of the executing court which objection was not raised by the judgment debtor in reply to the notice served upon him earlier or in the earlier application for setting aside the sales. The issue is fully covered by the decision of Dhanuka J. in Union Bank of India Vs.Byram Pestonji Gariwala; AIR 1991 Bombay 185, where the learned Judge following the decision of the Supreme Court in Mohanlal’s case held that the principle of

constructive resjudicata would apply by reason of omission on the part of the judgment debtor to take a plea of alleged nullity in response to the show cause notice issued by the Court under Order XXI Rule 22 of the Code of Civil Procedure and by reason of the notice having been made absolute by the Court allowing the decree holder to execute the decree the subsequent objection by the defendants that the decree was a nullity is barred by constructive resjudicata.

4. Our attention is also drawn to the judgment of P.N.Bhagwati (as he then was in Gujarat High Court) in the case of Ganchi Laxmichand Ambaran Vs.Tulsidas Madhavdas; AIR 1963 Gujarat 1. In that case the judgment debtor had failed to appear in answer to the notice under O.XXI Rule 22 of the Code of Civil Procedure and the order was passed permitting levy of execution under Order XXI Rule 23 of the Code of Civil Procedure. Later on the judgment debtor had filed his written statement raising several objections to the execution of the said decree. The question arose before the court as to whether on principles of constructive resjudicata the judgment debtor was precluded in law from raising such objections by reason of order having already been passed against the absent

judgment debtor under Order XXI rule 23 of the Code of Civil Procedure. Bhagwati J. observed as under:

> "The order under O.XXI,r.23 being a determination of a question within s.47 would amount to a decree within the meaning of s.2(2) and an appeal would, therefore, lie from such order. Now if the person against whom the decree is sought to be executed does not file an appeal from an order made against him under O.XXI, r.23, can he be permitted to contend at any subsequent stage of the execution proceeding that the order was not rightly made? If he cannot raise at any subsequent stage of the execution proceedings the same contentions which were urged by him against the execution of the decree at the time of the hearing of the notice under O.XXI r.22 for the effect of allowing him to do so would be to permit him to challenge the correctness of the order which he could do only by way of an appeal. The order passed by the Court under O.XXI r.23 would operate as resjudicata in regard to the contentions urged against the execution of the decree in

> answer to the notice under O.XXI r.22. If the order under O.XXI r.23 can operate as resjudicata in regard to the contentions urged at the hearing of the notice under O.XXI, r.22, that order must equally operate as constructive resjudicata in regard to the contentions which might and ought to have been urged against the execution of the decree in opposition to the notice under O.XXI r.22. Equally must the order under O.XXI r.23 operate as constructive resjudicata if the person against whom the decree is sought to be executed did not appear in answer to the notice under O.XXI r.22 and the order directing the decree to be executed was, therefore, made by the Court. In such a case all contentions which might and ought to have been urged by such person showing cause why the decree should not be executed would be barred by the principle of constructive resjudicata and it would not be open to such person to raise these contentions at any subsequent stage of the execution proceedings."

The learned Judge further observed in para 10 of the judgment as follows:

"Having regard to these decisions of the Privy Council and the Supreme Court, I must refuse to follow the decision of the High Court of Bombay in Mittasaheb Hirnna Kakalmali vs.Gurunath Hamnant Kulkarni (Supra) even though that is a decision of a Division Bench of the bombay Court, I, therefore, take the view that if the necessary conditions are satisfied the principle of constructive resjudicata applies to execution proceedings in all cases without any discretion in the Court whether or not to apply the same having regard to the fact and circumstances of a particular case. This being the position it is clear that the executing court having made the order on the notice under O.XXI r.22, directing issue of warrant for attachment, it was not open to the applicant to raise at a subsequent stage of the proceedings any contentions against the execution of the decree. All the contentions which the applicant wanted to raise by filing his written statement related to the execution of the decree and were contentions which the applicant wanted

> to raise by filing his written statement related to the execution of the decree and were contentions which might and ought to have been urged by him in answer to the notice under O.XXI r.22. These contentions were barred by constructive resjudicata as a result of the order made by the executing Court on the notice under O.XXI r.22 and the executing court was, therefore, right in rejecting the application of the applicant to raise these contentions in answer to the execution of the decree."

5. In our opinion, therefore, the learned single Judge was right in holding that the objection as to limitation was clearly barred by principles of constructive resjudicata. Reliance placed by Mr.Shah on the judgment of Laxman Dayaram Wani's case is totally misplaced. In that case the court came to the conclusion that there was no decision on the issue whether darkhast was barred by limitation. In that matter the judgment debtor had not remained present after service of notice under O.XXI R.22 of the Code of Civil Procedure and the court passed certain orders subject to limitation and thereafter an order was merely passed to proceed. The decision is clearly distinquishable

on facts.

6. Mr.Shah next submitted that the insolvency Court has no jurisdiction to entertain the proceedings as the judgment debtors are neither residing nor carrying on business within the jurisdiction of this Court. The submission is without any force. In Ramanlal Khanna Vs. Industrial Finance Corporation of India Ltd. (Appeal No.683 of 1993 in Notice of Motion No.23 of 1993 in Notice No.N/114 of 1992 and companion appeals decided on 17th September, 1993) the Division Bench of this Court has held that the question regarding jurisdiction cannot be decided in isolation without recording evidence and the same need not be entertained at the stage of setting aside the notice and can only be determined in a petition for adjudication under sec.11 of the Act. It may also be seen that the appellants are the Directors of M/s Tigrania Ispat Pvt.Ltd. having its registered office at 93/A, Jolly Maker I, Cuffe Parade, Colaba, Mumbai 400 005. Even if the judgment debtors have stopped the business which was carried on in Mumbai and shifted to Nashik the business which was carried on by the judgment debtors within the limits of Ordinary Civil Jurisdiction of this Court deemed to be

continued until all the trades or business liabilities have been discharged and the appellants must be deemed to have been carrying on the trade so long as the debts of the trade have remained unpaid. (see Harshad Ratilal Shah Vs.Ishardas Sudarshanlal (1986 Mh.L.J.325).

7. Last submission of Mr.Shah is that there was inordinate delay in filing the insolvency proceedings and the proceedings were taken out after 14 years after the decree was passed which is dated 13.6.1989. Reliance is placed on the decision of Calcutta High Court in Sunderlal & Sons Vs.Y.N.Singh; AIR 1976 Calcutta 471. In view of clear language of section 9(5) this contention cannot be entertained at the stage of notice. The appellants are free to agitate the same at the hearing of the adjudication proceedings.

8. In the result appeal is dismisssed.